UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Enbridge Pipelines (North Dakota) LLC — Docket No. IS07-359-000

ORDER REJECTING TARIFF

(Issued July 6, 2007)

1. On June 8, 2007, Enbridge Pipelines (North Dakota) LLC (Enbridge North Dakota) filed FERC No. 50 canceling FERC No. 47 and proposing a change to its prorationing procedures in conjunction with a planned expansion of its mainline system. Enbridge North Dakota proposes that FERC No. 50 become effective July 9, 2007. Several shippers protested the filing, principally contending that the tariff would violate Enbridge North Dakota's common carrier obligation under the Interstate Commerce Act (ICA) and the ICA's prohibition against undue or unreasonable preferences. As discussed below, the Commission rejects FERC No. 50 as premature.

Background

2. Enbridge North Dakota states that its 950-mile pipeline system historically has transported approximately 80,000 barrels per day (bpd) of crude petroleum from the Williston Basin to Clearbrook, Minnesota, where the pipeline connects with other pipeline systems that serve destinations in the upper Midwest and eastern Canada. Enbridge North Dakota explains that, pursuant to a settlement approved by the Commission in 2006,[1] Enbridge North Dakota currently is expanding its existing mainline capacity to approximately 110,000 bpd (Phase 5 expansion).

3. According to Enbridge North Dakota, it anticipates that its capacity will be substantially over-subscribed even when the Phase 5 expansion is completed. Therefore, states Enbridge North Dakota, it has been considering a further expansion beyond the 110,000 bpd level (Phase 6 expansion). To make the Phase 6 expansion economically feasible, Enbridge North Dakota contends that it needs shipper volume commitments to support the substantial capital and operating costs associated with that expansion. Thus, Enbridge North Dakota states that it will conduct an open season seeking volume commitments for up to 80 percent of the post-expansion capacity of the system.

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[1] *Enbridge Pipelines (North Dakota) LLC*, 117 FERC ¶ 61,131 (2006).

Enbridge North Dakota explains that shippers making long-term volume commitments to support the Phase 6 expansion will be given priority transportation service on its entire system once the Phase 6 expansion facilities go into service and the existing historical-based prorationing procedures are terminated, as provided in FERC No. 50.

Description of the Filing

4. Enbridge North Dakota states that its current prorationing policy is based on historical usage over a rolling 12-month base period. Enbridge North Dakota explains that "Regular Shippers" (shippers that have transported crude oil in three quarters of the months in the base period) generally are apportioned at least 90 percent of their average historical volumes over the base period. In contrast, states Enbridge North Dakota, "New Shippers" (shippers that do not qualify as Regular Shippers) are apportioned the remaining space on a pro rata basis. However, Enbridge North Dakota points out that some segments of its system now are apportioned on a purely pro rata basis due to the lack of a base period that did not include prorationing.

5. Enbridge North Dakota states that, to encourage shippers to make long-term commitments to the expanded system, it will offer committed shippers assurances that their committed volumes will be transported, regardless of the volume of uncommitted nominations. Enbridge North Dakota explains that this opportunity to receive priority transportation service will not be limited to any select class of shippers, but will be open to any shipper (Regular or New) that executes the necessary volume commitment at the end of the open season and agrees to pay the rate necessary to support the Phase 6 expansion.

6. Enbridge North Dakota contends that its proposed prorationing procedures meet the requirements of the ICA and Commission precedent. Enbridge North Dakota points out that the Commission has stated that "[t]here is no single method of allocating capacity in times of excess demand in oil pipelines and pipelines should have some latitude in crafting allocation methods to meet circumstances specific to their operations."[2] Indeed, continues Enbridge North Dakota, the Commission has approved prorationing policies that reserve a percentage of available capacity for shippers whose volume commitments support a pipeline expansion.[3] Enbridge North Dakota also argues that, as the

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[2] Enbridge North Dakota cites *Mid-America Pipeline Co.*, 106 FERC ¶ 61,094, at 61,336 (2004) (*Mid-America I*) (*citing SFPP, L.P.*, 86 FERC ¶ 61,022, at 61,115 (1999) and *Total Petroleum Inc. v. Citgo Products Pipeline, Inc.*, 76 FERC ¶ 61,164, at 61,947 (1996)).

[3] Enbridge North Dakota cites, *e.g.*, *Mid-America Pipeline Co.*, 116 FERC ¶ 61,040, at P 24 (2006) (*Mid-America II*).

Commission explained in *Mid-America II*, because a certain amount of the pipeline's capacity would remain available for non-committed shippers, "neither historical shippers nor new shippers will be shut out from the line or denied access if they decide not to sign a long-term volume commitment."[4] In other words, reasons Enbridge North Dakota, there is no undue discrimination in its proposed prorationing procedures because each shipper can choose to execute a volume commitment and become eligible for priority service under the new prorationing scheme.

7. Enbridge North Dakota explains that it proposes to reserve up to 80 percent of its post-expansion capacity for shippers that make the required volume commitments. However, Enbridge North Dakota states that the remaining 20 percent of the post-expansion capacity would be available to all shippers (including committed shippers whose nominations exceed their committed volume) on a pro rata basis. Enbridge North Dakota states that its existing historically-based prorationing procedures would cease to apply as of the in-service date of the Phase 6 expansion. Thus, the new prorationing procedures would then apply to pre-Phase 6-expansion capacity as well.

8. In addition to conducting the open season, Enbridge North Dakota states that it has filed FERC No. 50 to provide additional notice to all shippers of the proposed change in prorationing procedures associated with the Phase 6 expansion. Further, Enbridge North Dakota states that it intends to file a petition for declaratory order at the end of the open season seeking Commission approval of the priority service arrangement contained in FERC No. 50. According to Enbridge North Dakota, the ultimate implementation of that arrangement will be subject to the Commission's ruling on the petition.

Interventions, Protests, and Answer

9. Eighty-Eight Oil LLC (Eighty-Eight), Flint Hills Resources (Flint Hills), Murphy Oil USA, Inc. and Nexen Marketing U.S.A., Inc. (Murphy and Nexen), and Texon, L.P. (Texon) filed motions to intervene and protests. Each of these parties is a shipper on Enbridge North Dakota's system. Flint Hills also states that it owns a refinery at Pine Bend, Minnesota, that refines crude oil delivered to Clearbrook via the Enbridge North Dakota system. The protesting parties generally contend that Enbridge North Dakota's proposed tariff change would violate the ICA (particularly the pipeline's common carrier obligation and the prohibition against undue preferences)[5] and is inconsistent with

[4] *Id.*

[5] Texon cites *National Association of Regulatory Utility Commissions v. FCC*, 525 F.2d 630 at 641 (D.C. Cir. 1976) ("What appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier undertakes to carry for all people indifferently.").

Commission precedent. They assert that the required 10-year commitment to obtain priority service is unjust and unreasonable, that the open season and Transportation Service Agreement (TSA) are unjust and unreasonable, and that the proposed tariff changes lack a definitive effective date. They also contend that the assurances sought by Enbridge North Dakota are unnecessary for it to expand its system. The protesting parties ask the Commission to reject the tariff or to accept and suspend it and set it for hearing.

10. Eighty-Eight asserts that it is currently apportioned fewer barrels than it nominates on Enbridge North Dakota's system. Eighty-Eight fears that the proposed prorationing procedures will end its qualification as a Regular Shipper, and, unless it commits to having a specific volume transported during a 10-year term, the existing capacity allocated to it on the Enbridge North Dakota system (including Phase 5 expansion capacity) will be reduced dramatically, despite its (and other shippers') agreement to support recovery of the Phase 5 costs through a surcharge. The protesting parties point out that FERC No. 50 proposes to revise Enbridge North Dakota's prorationing procedures to define "available capacity" as the total capacity of the line segments on its trunkline. Further, they point out that, while the pipeline states that it will reserve up to 80 percent of the post-expansion available capacity for shippers that make the required commitment and that the remaining 20 percent will be available to all shippers on a pro rata basis, the tariff itself does not contain such provisions.[6]

11. The protesting parties state that the ICA requires that a common carrier not favor one shipper or set of shippers over others when the total volume of nominations exceeds the pipeline's capacity. According to Eighty-Eight, the common carrier must allocate its capacity on some equitable basis, and the Commission has held that a prorationing policy that accommodates the entire request of one shipper, while denying the entire request of

[6] Eighty-Eight quotes Item No. 65(f)(ii)(a) of FERC No. 50 as follows:

> Each Committed Shipper will first be apportioned the lesser of its actual nomination for the month or its Committed Volume under its TSA, provided that, in the event that the sum of all Committed Shippers' apportioned volumes in this first step exceeds the Available Capacity for the month, all Committed Shippers' apportioned volumes will be reduced pro rata to a volume that equals the Available Capacity in such month.

Eighty-Eight states that, after this first step, any remaining capacity will be apportioned on a pro rata basis among all shippers who have submitted nominations, including any shipper that has made a volume commitment to the extent it nominated volumes in excess of its committed volumes.

another shipper, is not ordinarily permissible.[7] Further, continues Eighty-Eight, the Commission has expressly declared unlawful a policy that "takes the form of a guarantee of service, which, in effect, denies access to other shippers" because such a policy violates the common carrier obligation to provide service upon reasonable request.[8] While it acknowledges that common carriers can make reasonable and appropriate rules regarding the use of their capacity, Texon argues that Enbridge North Dakota has not demonstrated that its proposed prorationing procedures are appropriate under the unique circumstances of its system.[9]

12. The protesting parties argue that Enbridge North Dakota's reliance on *Mid-America II* is misplaced because the prorationing procedure approved in that case did not usurp existing historical prorationing procedures on pre-expansion capacity and allowed a significant amount of total capacity to remain available to non-volume incentive shippers. In contrast, continue the protesting parties, Enbridge North Dakota's FERC No. 50 would make very little of the carrier's capacity available to uncommitted shippers.[10] In particular, Flint Hills contends that the Commission has authorized numerous departures from traditional pro rata prorationing policies in favor of historically-based allocations,[11] but Enbridge North Dakota's proposal is unprecedented and would end historically-based

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[7] Eighty-Eight cites *Belle Fourche Pipeline Co.*, 28 FERC ¶ 61,150, at p. 61,281-82 (1984).

[8] Eighty-Eight cites *Texaco Pipeline Inc.*, 74 FERC ¶ 61,071, at p. 61,201 and n.5 (1996).

[9] Texon cites *Lakehead Pipe Line Co., L.P.*, Opinion No. 397, 71 FERC ¶ 61,338, at p. 62,325 (1995), *red's denied*, Opinion No. 397-A, 75 FERC ¶ 61,181 (1996); *Platte Pipe Line Co*., 115 FERC ¶ 61,215, at P.32, *order following technical conference*, 117 FERC ¶ 61,926 (2006).

[10] *Mid-America Pipeline Company, LLC*, 116 FERC ¶ 61,040, at P 24 (2006). Texon quotes the following statement from that case:

> Approximately 25 percent of total capacity will be available under the new incentive program (80% x 90,000 bpd Expansion Capacity) compared with 275,000 bpd total system-wide capacity. Non-volume incentive shippers will be eligible to ship on approximately 75 percent of the line. Thus, neither historical shippers nor new shippers will be denied access even if they do not sign long-term volume dedications.

[11] Flint Hills cites *ConocoPhillips Transportation Alaska, Inc.*, 112 FERC ¶ 61,213 at P 28 (2005).

allocations on its system. Murphy and Nexen emphasize that the Commission has considered proposals by pipelines to finance new lines or expansions of existing pipelines through TSAs or take-or-pay contracts over the past several years, but in none of these cases has the Commission permitted a petroleum pipeline to finance an expansion of an existing line by displacing current or historic shippers.

13. Eighty-Eight illustrates the shippers' concern as follows: if Enbridge North Dakota receives commitments for 100 percent of the system's capacity during the open season, and if each shipper nominates its full allocation, no other shippers' requests for transportation can be honored. Thus, the protesting parties argue that FERC No. 50 would violate ICA section 1(4) by denying uncommitted shippers access to transportation on the system. The protesting parties further assert that the proposal violates ICA section 3(1) because it would provide committed shippers an undue and unreasonable advantage, while unduly and unreasonably subjecting uncommitted shippers to prejudice and disadvantage. Eighty-Eight also points out that, even if some capacity remained available after the first apportionment step, the committed shippers would still have the opportunity to use some, if not most, of the remaining available capacity to transport their crude oil. In the protesting parties' view, this means that shippers that may be unwilling or unable to commit certain volumes during the open season will be at an unreasonable disadvantage because they cannot become eligible for priority service.

14. The protesting parties further claim that the proposed priority service is unnecessary. Eighty-Eight cites Enbridge North Dakota's 2006 proposal for a surcharge to recover the costs of the Phase 5 expansion. Eighty-Eight explains that it and other shippers agreed to support that proposal because it would allow more capacity to move crude oil to Clearbrook due to the price differential in the Clearbrook market. Thus, argues Eighty-Eight, there is no need for the 10-year commitments because the need for additional capacity to Clearbrook is adequate to support the pipeline expansion. Eighty-Eight also argues that, although the shippers are committed to pay the surcharge to support the Phase 5 expansion, the current proposal may force them to reduce their shipments on the pipeline.[12]

15. The protesting parties also raise other issues. Eighty-Eight asserts that Enbridge North Dakota's implementation of its current prorationing procedures violates the ICA. Eighty-Eight states that, while Enbridge North Dakota claims that certain segments of its system are being apportioned on a pro rata basis, the pipeline's current tariff contains no such provision. Texon maintains that the 10-year commitment required to obtain priority

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[12] Murphy and Nexen state that in the context of natural gas, the Commission has recognized that existing shippers should not be forced to subsidize new expansion capacity. They cite *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,277 at p. 61,746 (1999).

transportation would be an excessive term that would cost it millions of dollars. Texon contends that the industry practice is such that producers generally are not willing to make such lengthy commitments to sell their crude oil. Texon also states that the Commission should require Enbridge North Dakota to file the entire TSA as part of its tariff or at least to identify provisions that should be included. Additionally, Texon contends that certain provisions of the TSA are unjust, unreasonable, and unduly discriminatory.

16. Flint Hills also asserts that the proposed tariff changes should be rejected on procedural grounds. First, Flint Hill notes the proposed tariff change at issue is not projected to occur until an indefinite date more than 60 days beyond the date of filing, and section 341.2(b) of the Commission's regulations requires that all tariff publications must be filed not less than 30, nor more than 60, days prior to the proposed effective date.[13] Flint Hills also claims that Enbridge North Dakota does not specify the "rate required to support the Phase 6 Expansion." Therefore, if the Commission does not reject FERC No. 50, Flint Hills requests that the Commission suspend the proposed tariff for the maximum statutory period, with any substantive rulings deferred to allow the Commission to evaluate Enbridge North Dakota's proposal in the context of the declaratory order that Enbridge North Dakota claims that it will file upon completion of the Phase 6 open season.

17. Finally, Murphy and Nexen claim that Enbridge North Dakota does not need any of the guarantees that it is asking shippers to provide for the expansion of its pipeline system. They contend that the carrier has been (1) over-recovering its cost of service for the past two years by more than $3.5 million; (2) achieving rates of return on its pipeline operations in 2005 (21.4 percent) and 2006 (15.7 percent) that greatly exceeded what the pipeline itself claims is justifiable (between eight and nine percent); and (3) achieving returns on operating revenues and overall revenues at extremely high levels (profits of $12.2 million on operating revenues of $31 million in 2006 or a 40 percent return). Further, they maintain that Enbridge North Dakota's parent company's resources demonstrate an unquestioned ability to finance the Phase 6 Expansion without any assistance.

18. In its answer, Enbridge North Dakota states that it is in the midst of the Phase 6 open season. It asserts that the capacity offered in the open season is expressly limited to no more than 80 percent of the capacity of each segment of the expanded pipeline. Thus, states Enbridge North Dakota, even if all committed shippers use their full committed space, 20 percent of the capacity will be available for uncommitted volumes. Enbridge North Dakota also emphasizes that if the Phase 6 expansion is not built and placed in service, FERC No. 50 will have no effect.

[13] 18 C.F.R. § 341.2(b) (2006).

19. Enbridge North Dakota acknowledges that:

> The terms of the open season and the TSA are not before the Commission at this time. As indicated in the transmittal letter for FERC No. 50, once the open season is completed, [Enbridge North Dakota] intends to file a Petition for Declaratory Order seeking Commission rulings on the post-expansion rate structure for [Enbridge North Dakota] and the provision of priority service to Committed Shippers on the agreed terms resulting from the open season. The Phase 6 Expansion will go forward only if the Commission approves the proposed rate and service terms.[14]

20. Enbridge North Dakota also maintains that FERC No. 50 does not violate the rule against tariffs being filed more than 60 days before their effective date, that offering the proposed priority service to shippers does not violate its common carrier obligations, and that it is not unduly discriminatory. Further, Enbridge North Dakota argues that a shipper's past use of the system does not give it any priority rights over any other shippers, that shippers made no commitment to transport any volumes to support the Phase 5 expansion, and that no shipper has paid the Phase 5 surcharge because it is not yet in effect. Enbridge North Dakota admits that its proposal differs from that approved by the Commission in *Mid-America II* because that case involved firm capacity expansion only.

<u>Commission Analysis</u>

21. As discussed below, the Commission rejects FERC No. 50 as premature. Enbridge North Dakota has asked the Commission to approve a discrete aspect of its proposal to finance the proposed Phase 6 expansion without affording its shippers or the Commission an opportunity to examine all other aspects of the Phase 6 proposal. The Commission cannot determine whether FERC No. 50 is just and reasonable without reviewing all related aspects of Enbridge North Dakota's proposal. The pipeline has stated that it intends to file a petition for a declaratory order asking the Commission to review other terms of the Phase 6 expansion proposal, including the terms of the open season, the provisions of the TSA, and the rates to be charged. Enbridge North Dakota may at that time propose a prorationing procedure, and the Commission will address it in the context of the entire Phase 6 proposal.

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[14] Response of Enbridge Pipelines (North Dakota) LLC to Protests, July 2, 2007 at 2 n.2.

22. Enbridge North Dakota acknowledges that its FERC No. 50 differs from the prorationing procedures approved in *Mid-America II*. In that case, the Commission described Mid-America's proposal as follows:

> All shippers, both current and new, will be equally eligible to participate in the new volume incentive program. . . . MAPL is entitled to offer incentive rates tied to volume and term requirements under its new program, as it has chosen to do. Further, MAPL has chosen to apply the same capacity allocation methodology applicable to the Expansion Capacity under the new program that it has applied to the existing program. . . .
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> Additionally, MAPL has increased Expansion Capacity under the new program, and this increased capacity will be allocated on the same 80/20 percent basis as the original Expansion Capacity. The total Expansion Capacity to be available in August 2007 under the new program is estimated to be approximately 90,000 bpd, which includes the current Expansion Capacity of 40,000 bpd. The 1999 capacity accounted for only approximately 12 percent of total capacity (80% x 40,000 Expansion Capacity) compared with 225,000 bpd total system-wide capacity. Approximately 25 percent of total capacity will be available under the new incentive program (80% x 90,000 bpd Expansion Capacity) compared with 275,000 bpd total system-wide capacity. Non-volume incentive shippers will be eligible to ship on approximately 75 percent of the line. Thus neither historical shippers nor new shippers will be denied access even if they do not sign long-term volume dedications.[15]

23. The differences in the Mid-America proposal and Enbridge North Dakota's proposal are significant, and outweigh any similarities. While both address volume incentive programs, which the Commission does allow, the Mid-America proposal had major differences. To begin with, Mid-America did not propose to change its prorationing rules regarding its base capacity of 185,000 bpd that existing shippers had available prior to a 1999 expansion. Mid-America had a separate prorationing mechanism for its expansion of 40,000 bpd added in 1999. This expansion capacity was sold under an incentive rate program that terminated February 1, 2007. Mid-America's new expansion program used this 40,000 bpd from the terminated program plus 50,000 bpd from a proposed expansion. As a result, its new volume incentive program would not affect the historical shippers using its 185,000 bpd base capacity. Neither did it affect shippers under its old incentive program, since that program terminated in 2007.

24. In contrast, Enbridge North Dakota's FERC No. 50 completely eliminates its existing historically-based allocation methodology in favor of one that could prevent

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[15] *Mid-America Pipeline Company, LLC*, 116 FERC ¶ 61,040 at P 23-24 (2006).

current shippers from using facilities they have funded through the rates they have paid. While Mid-America's proposal applied the new incentive program to approximately 25 percent of its total capacity, Enbridge North Dakota's proposal would make all of its existing and expansion capacity subject to the Phase 6 expansion. Thus, in Mid-America's case, the Commission found that non-incentive volume shippers would be eligible to ship on 75 percent of the system. Accordingly, the Commission found that neither historical nor new shippers would be denied access even if they did not sign long-term volume dedications, and Mid-America's approach was not unduly or unreasonably preferential.

25. As stated above, the Commission finds that Enbridge North Dakota's FERC No. 50 is premature and does not allow the Commission or the shippers to assess it in the context of the entire Phase 6 expansion proposal. Enbridge North Dakota admits that its proposal differs from that approved in *Mid-America II*. When Enbridge North Dakota files its petition for a declaratory order addressing all aspects of the proposed Phase 6 expansion, the Commission will review any prorationing procedures that Enbridge North Dakota files along with its petition. Because Enbridge North Dakota acknowledges that FERC No. 50 would not be implemented until the Phase 6 expansion is placed in service, the Commission finds that its rejection of FERC No. 50 will not cause any significant disadvantage to Enbridge North Dakota, while at the same time protecting the pipeline's shippers from being subject to a prorationing procedure that must be evaluated in the context of the entire declaratory order package.

26. In light of this determination, it is unnecessary for the Commission to address the protesting parties' other arguments. Commenters and protestors in the instant proceeding will retain all rights and opportunities in the declaratory order proceeding, and the rejection of FERC No. 50 as premature does not in any way prejudice them from raising the arguments again in the declaratory order proceeding, nor does the rejection indicate that the Commission has ruled on the merits of any of the arguments.

<u>The Commission orders:</u>

FERC No. 50 is rejected as premature, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.